

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL B. HOWARD,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 235162
Wayne Circuit Court
LC No. 00-012219

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), aggravated stalking, MCL 750.411i, and assault with a dangerous weapon, MCL 750.82. The court sentenced defendant as an habitual offender, MCL 769.13, to terms of eight to fifteen years' imprisonment for first-degree home invasion and aggravated stalking, and a term of two to four years' imprisonment for assault with a dangerous weapon. Defendant appeals as of right. We affirm.

Defendant is the victim's ex-boyfriend. The most significant event leading to the charges against defendant occurred on September 24, 2000. According to the victim, after returning home from work, she discovered defendant in her house. Defendant attacked her by striking her with his fists and thereafter retrieved a knife from the kitchen and attempted to stab her.

Defendant's appeal consists of several issues concerning an alleged missing witness at trial. At trial, after the prosecution rested, defense counsel requested a one-day continuance to secure the presence of an alleged witness to testify for the defense. At the time of the motion, defense counsel revealed only the name of the witness and that the witness was an eyewitness to the events on September 24. Defense counsel noted that he had not filed a formal witness list naming the witness, and claimed that the reason he had not listed the witness was because he had wanted to speak with the victim's ex-husband before deciding whether to call the witness. According to defense counsel, he was never able to locate the ex-husband and did not feel it appropriate to get the information from the victim. Indicating that trial had been scheduled for several months, that the prosecution had received no information regarding the witness, and that defendant had been given ample time to prepare and present a defense, the trial court denied the motion for a continuance.

At sentencing, defense counsel moved for a new trial based on the trial court's denial of defendant's motion for a continuance. According to defense counsel, the trial court should have granted a continuance to produce the missing witness because:

She [the witness] was an eyewitness to the altercation. She would have testified that the defendant did not actually force entry into the victim's home. Instead, the victim came out of the home armed with a knife, got into a fight with [the witness], which defendant then broke up. The defendant then after breaking up, carried the victim on his sholders [sic] where they entered the house and they had a discussion.

The court denied defense counsel's motion for new trial and defendant attempted to raise a motion for new trial based on ineffective assistance of counsel. The court denied that motion, stating that defendant had to raise the motion as a post-conviction motion.

Defendant first argues the trial court erred in denying a continuance. Although defendant provided little legal support for this issue, he essentially argues that the court should have granted a continuance because of the absence of an eyewitness. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

A motion for a continuance must be based on good cause. MCR 2.503(B)(1); *Jackson*, *supra* at 276. MCR 2.503(C), which governs the granting of adjournments on the basis of the unavailability of a witness or evidence, provides:

(C) Absence of Witness or Evidence.

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

(3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary. [*Jackson*, *supra* at 276-277.]

In denying the request for continuance, the trial court properly noted that the case had been pending for some time, the prosecution had not been given any information regarding the witness, and defendant had been given ample time to prepare and present a defense. Counsel knew of this witness and made no effort to present the witness earlier in the case. Counsel

waited until the end of trial to request a continuance to obtain this witness. The trial court did not abuse its discretion in denying defendant's request for a continuance.

Defendant next argues the trial court erred in denying defendant's motion for new trial. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

During the motion for new trial, defense counsel stated that the alleged eyewitness would have testified that defendant did not actually force entry into the victim's home; rather, the victim came out of the home armed with a knife and started a fight with the witness, and that defendant broke up the fight and carried the victim into the house. The court denied the motion for new trial stating, "I don't believe there's any grounds for granting a new trial. Defendant received a fair trial here. There's simply no basis for granting a new trial at this time."

A new trial may be granted where an irregularity in the proceedings or abuse of discretion denied the defendant a fair trial. MCR 2.611(A)(1)(a). Here, the trial court did not abuse its discretion in denying defendant's motion for a continuance. A new trial may also be granted where there is newly discovered material evidence that could not have been discovered and produced at trial with reasonable diligence. MCR 2.611(A)(1)(f). Here, defense counsel admittedly knew of this alleged missing witness and made no effort to produce the witness at trial. A new trial may also be granted if the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Although defense counsel made an offer of proof regarding the witness' proposed testimony, defense counsel never produced the witness or an affidavit. Defense counsel never questioned the victim about this witness. Under the circumstances, the trial court did not abuse its discretion in denying defendant's motion for new trial.

Finally, defendant argues he received ineffective assistance of counsel because trial counsel failed to produce the witness. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).¹ Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; (3) and that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *Rocky, supra*. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

¹ Defendant attempted to move for a new trial at sentencing based on an ineffective assistance claim; however, the court declined to hear the motion, indicating that it was a post-conviction motion that needed to be filed. Defendant failed to file the post-conviction motion and no hearing was held in the lower court.

At trial during the motion for a continuance, defense counsel reasoned that he had not endorsed the witness because he had wanted to interview the victim's ex-husband before deciding whether to call the witness. Counsel claimed he had not been able to contact the victim's ex-husband and did not feel it appropriate to approach the victim for the information. It appears counsel was hesitant to produce the witness earlier in the case without further investigating the matter. Counsel may have questioned the witness' credibility and could have been concerned with presenting perjurious testimony. Although counsel later decided to call the witness, we are unable to conclude counsel's failure to present the witness earlier in the case was not a matter of trial strategy.

Further, defendant has failed to show prejudice. Defendant never produced the missing witness or an affidavit from the witness. On appeal, appellate counsel admits he has been unable to locate the witness. Beyond trial counsel's assertion regarding the name of the alleged witness and the subject of the proposed testimony, there is no evidence of who this witness is or where she is located. Based on the record there is no definitive evidence that this witness even exists, nor is there any evidence that this witness' testimony would have changed the outcome of trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood